

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

EXAMWORKS, a Delaware limited  
liability company,

Plaintiff,

v.

TODD BALDINI, et al.,

Defendants.

No. 2:20-CV-00920-KJM-DB

ORDER

Plaintiff ExamWorks, LLC has sued its former employees, L. Stuart Girard, Todd Baldini, Pamela Tejada and Abygail Bird (collectively “defendants”), alleging misappropriation of its trade secrets. ExamWorks moves for a preliminary injunction barring defendants’ continued misappropriation of those trade secrets. The court, having considered the arguments of counsel on May 22, 2020, and June 3, 2020, and the parties’ briefs including supplemental briefing, HAS GRANTED plaintiff’s motion, for the reasons EXPLAINED below.<sup>1</sup>

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<sup>1</sup> This order provides the court’s explanation for the summary order entered previously on June 3, 2020. *See* ECF No. 45. The court notes defendants have filed a motion to stay the preliminary injunction order, ECF No. 49, which the court will turn to next.

I. BACKGROUND

A. Factual Background and Allegations

ExamWorks is an independent firm that operates in what it dubs a “med-legal” space by managing medical examinations, peer reviews, bill reviews, Medicare compliance and related services for clients including insurance carriers, third party claim administrators and government agencies throughout the United States. Nalley Decl. ¶ 3, ECF No. 4-5. Through its network of medical professionals, ExamWorks offers medical evaluation services, including Independent Medical Examinations (“IMEs”), Qualified Medical Evaluations (“QMEs”) and California Subsequent Injury Benefit Trust Fund (“SIBTF”) evaluations for workers’ compensation claims, personal injury, and auto and disability claims. *Id.* ¶¶ 3, 16.

1. Former Employees’ Departure from ExamWorks

Between February 24 and May 4, 2020, plaintiff’s former employees, Lawrence Stuart Girard, Todd Baldini, Pamella Tejada and Abygail Bird (together the “Former Employees”) either resigned or, once ExamWorks got wind of the Former Employees’ plans, were terminated from ExamWorks. Compl. ¶¶ 41–45, ECF No. 1. Specifically, Tejada resigned on February 24, 2020 and left on March 13, 2020; Girard left on March 13, 2020; ExamWorks terminated Baldini on April 29, 2020 and terminated Bird on May 4, 2020. *Id.*

Girard had served as Vice President of Sales and Marketing and worked for ExamWorks for more than a decade. *Id.* ¶ 20. Baldini was the Regional Vice President of Operations in California and worked for ExamWorks for over nine years. *Id.* ¶ 21. Together, Girard and Baldini led ExamWorks’ California operation. *Id.* ¶ 22. Baldini more broadly supervised ExamWorks’ business in the Western regions, including California and Hawaii. *Id.* ¶ 33. Due to their management roles, Girard and Baldini had full access to ExamWorks’ financials and other trade secret and confidential information. *Id.* ¶ 22.

Tejada was the SIBTF Division Manager in Sacramento, California and had worked at ExamWorks for nearly four years. *Id.* ¶ 23. Tejada’s duties included meeting with clients and perspective clients, assigning new cases to physicians, educating physicians on

1 reporting requirements and management of the internal operational team. *Id.* Tejada had access  
 2 to all data associated with ExamWorks' California operations and SIBTF work. *Id.*

3 Bird worked for ExamWorks for more than seven years as a marketing director  
 4 until she was promoted to Regional Account Executive for California. *Id.* ¶ 24. In her various  
 5 roles, Bird was responsible for marketing, doctor referrals, raising ExamWorks' profile and,  
 6 generally, bringing in business for ExamWorks. *Id.* Both Bird and Tejada worked closely with  
 7 Girard and Baldini. *Id.*

## 8 2. "Project Palo Alto"

9 Following the Former Employees' departure, ExamWorks discovered that,  
 10 beginning in October 2018, the Former Employees had begun development of a comprehensive  
 11 business plan dubbed "Project Palo Alto," as reflected in multiple emails and planning  
 12 documents. TRO Mot., ECF No. 4, at 11<sup>2</sup> (citing Holley Decl. ¶¶ 8, 10, ECF No. 28-1). In a  
 13 document dated April 8, 2019, Former Employees identified the need to plan "the best way to  
 14 depart ExamWorks without raising suspicion. Was it best to go 'One at a time vs. together'?  
 15 What would the explanation be for their departures?" Holley Decl., Ex. E ("Meeting Outline"),  
 16 ECF No. 21-2, at 18–19 ("If separate, who first, when, how and why? . . . if Second who second  
 17 when, how and why?").

18 Through expedited discovery after the court issued a temporary restraining order,  
 19 ExamWorks learned the "Project Palo Alto" business plan outlined creation of a company called  
 20 "Feinberg Med-Legal Consultants," which would compete directly with ExamWorks' emerging  
 21 SIBTF business and expand initially by "targeting two specific demographics: 1. Physician  
 22 recruiting and 2. Applicant Attorney<sup>3</sup> Firms." Holley Decl., Ex. O ("Feinberg Med-Legal  
 23 Consultants Plan Overview"), ECF No. 21-2, at 27. The new company would be co-owned by  
 24 Girard, ExamWorks vendor James Tuthill and former ExamWorks medical provider Dr. Steven

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25 <sup>2</sup> The court cites to the page numbers assigned by the court's ECF system.

26 <sup>3</sup> Applicant or applicants' attorneys represent injured workers filing for workers'  
 27 compensation. *See, e.g.,* <https://wwwcaaa.org/> (website for California Applicants' Attorneys  
 28 Association).

1     Feinberg. *Id.* William George would be an equity partner as well and serve as CFO. *Id.* at 19.  
2     The plan also included a 24-month budget for the new company. Harris Decl. ¶ 18, ECF No. 21  
3     (“Among the files Girard attempted to delete while the USB drive was attached were “Project  
4     Palo Alto Construction meeting 4-8-19.docx” and “FML Budget Draft-24 month 7-3-19 Run Rate  
5     Analysis Final.xlsx”); Holley Decl., Ex. Q (“Draft Budget”), ECF No. 21-2, at 31 (attachment to  
6     email showing link to document titled draft budget for Project Palo Alto).

7                     3.     ExamWorks’ Forensic Investigation

8                     Before filing the instant motion, ExamWorks engaged a forensic firm, K2  
9     Intelligence and its partner forensics and e-discovery provider KLDISCOVERY (collectively “K2”),  
10    “in order to investigate the defendant’s [sic] actions related to this lawsuit.” Nalley, Decl. ¶ 27  
11    (citing Holley Decl. ¶ 8, ECF No. 21-2). K2’s analysis revealed Former Employees took  
12    ExamWorks’ documents and information with them when they left the company, including  
13    (1) detailed contact information about doctors and clients, and company-wide customer and  
14    doctor lists; (2) financial information about plaintiff’s California operations; (3) a California sales  
15    and operational presentation; and (4) specific arrangements regarding the compensation plaintiff  
16    offers to certain doctors, Nalley Decl. ¶ 27; defendants emailed this information to their personal  
17    email accounts or to third parties, Harris Decl. ¶ 13, ECF No. 21. As recently as March 22, 2020,  
18    just over a week after Girard and Tejada left ExamWorks and about a month before Baldini was  
19    terminated, it appears Baldini sent the file titled “Cases-01-2019 to 03-202.xlsx,” an ExamWorks  
20    document containing information on more than 53,000 cases from the last year and a half with  
21    detailed contact information for both doctors and customers, from his ExamWorks email to his  
22    personal email address. *Id.* ¶ 29.

23                    The K2 forensic analysis also revealed that, as early as March 3, 2019, Girard sent  
24    documents titled “Brice B Fee Schedule 022719.PDF,” “Proposal- Brice 022719.PDF,” “Brice B  
25    Fee Schedule Disbursement 022719,” and “Professional Fee Agreement\_CA EW BBrice WC Fee  
26    Schedule 022719.pdf” to his personal email address. *Id.* ¶ 39 (“Together these documents  
27    represent the ‘recipe’ book of how ExamWorks engages doctors into its network.”). On April 5,  
28    2019, Baldini emailed to himself documents titled, “EW California\_MQY\_6Jun19.xlsx,”

1 “Financials by Company-Region-BusUnit – 2018 SIBTF.xlsx,” “Budget Worksheet – CA  
 2 2019.xlsx,” “Likely Calcs – gina.xlsx” and “California WC Fee Analysis 10\_17\_19v10.xlsx.” *Id.*  
 3 ¶¶ 33–36 (documents are types of financial tools, valuable for business budget projection). Later  
 4 in the year, on October 17, 2019, Girard sent “Page Count Reports Reveals Sups and QMEs  
 5 v2.xlsx” to his personal email address. *Id.* ¶ 36 (citing confidential and proprietary models used  
 6 to analyze effects of expected changes in California’s rules related to QMEs for Workers’  
 7 Compensation). Less than two weeks later, on October 29, 2019, Girard sent files titled “SIBTF  
 8 Cases – 01-2019 to 10-2019.xlsx,” and “SIBTF CA Referral Tracker by Office v2 01-2019 to 10-  
 9 2019.xlsx” to his personal email. Nalley Decl. ¶ 31. These files contain specific billing details,  
 10 including doctor goals, average fees per specialty and a breakdown of the SIBTF referrals by  
 11 month for more than 1,200 of ExamWorks’ cases. *Id.* K2’s analysis further revealed that on  
 12 January 8, 2020, Girard sent “Sales and Operations Meeting 010820.pptx” to his personal email;  
 13 this PowerPoint presentation was used at plaintiff’s quarterly meeting to discuss high-level  
 14 strategy and “includes lists of specific ExamWorks clients that were identified as strategic  
 15 targets.” *Id.* ¶ 37. Moreover, “on page 57 of the presentation, the top five offices for a certain  
 16 account representative is identified including how many referrals these law firms have provided.”  
 17 *Id.* The next day, on January 9, 2020, Girard sent himself “2019 First Case – CA Only.xlsx.” *Id.*  
 18 ¶ 32.

19 K2’s analysis of the other two Former Employees materials produced similar  
 20 results indicating, for example, in December 2019, five months before she was terminated and  
 21 three months before Girard left ExamWorks, Bird sent documents to Girard’s personal email,  
 22 including files titled “Clients. Xlsx,” containing 125,756 unique client entries with detailed  
 23 contact information for plaintiff’s entire United States client base; she also forwarded  
 24 “Doctors.xlsx,” “Doctors List 073018.xlsx” and “EW WC Emails 2.13.2020.xlsx,” containing  
 25 detailed contact information for more than 10,000 doctors across plaintiff’s entire doctor network,  
 26 including names, email addresses and specialties. *Id.* ¶¶ 28, 30. On January 16, 2020, Tejada  
 27 sent the list identified as “Brown & Todoroff.xlsx” to her personal email address, noting “[E]xcel  
 28 sheet represents pending cases including status of cases, for this particular law firm.” *Id.* ¶ 38.

1 Ms. Tejada takes the position that “[o]n January 16, 2020, as part of my work for ExamWorks, I  
2 visited the law firm, Brown & Todoroff. Because his [sic] office was located in a small town,  
3 where I could not be sure I would have an internet connection, I emailed myself a spreadsheet of  
4 his pending cases for my meeting. I did this to ensure that I would have the spreadsheet on my  
5 desktop for my meeting with the law firm client, and that I would not need to access the internet  
6 to pull up the spreadsheet.” Tejada Decl. ¶ 8, ECF No. 26-4.

7 Finally, the forensic analysis shows that only six days after he left ExamWorks, on  
8 March 19, 2020, Girard emailed Dr. Feinberg from his IPM email account, copying Tejada and  
9 telling them: “Lots to do. This is the spreadsheet we used to blast our message yesterday.” Pl.’s  
10 Suppl. Br., ECF No. 39, at 2 (referencing attachment titled “Client 2019.xlsx”). Mot. Prelim. Inj.,  
11 Ex. 1 (“Girard March 19 Email”), ECF No. 52-1, at 15 (attachment to email showing Excel  
12 spreadsheet) (sealed).<sup>4</sup> There is a spreadsheet in the record labeled “Client 2019.xlsx” that  
13 plaintiff asserts is very similar to the spreadsheet defendants must have used for the March 19  
14 “blast out.” Pl.’s Suppl. Br. at 5 (referencing Holley Decl. at 11–18). On the eve of the court’s  
15 June 3 hearing, Girard attempted to clean up the record on this point, saying, “When I sent out the  
16 March 19, 2020 email, I must have been confused when referencing the ExamWorks client list to  
17 describe a prior ‘blast.’ I was certainly referring to an IPM patient letter that . . . had just been  
18 sent out only to IPM patients.” Girard Suppl. Decl. ¶ 3, ECF No. 43; *id.*, Ex. 1 (template of letter  
19 to IPM customers) at 5.

20 B. Procedural Background

21 On May 4, 2020, plaintiff filed its complaint against defendants asserting the  
22 following claims: (1) misappropriation of trade secrets in violation of the federal Defend Trade  
23 Secrets Act (“DTSA”), 18 U.S.C. § 1836; (2) misappropriation of trade secrets in violation of the  
24 California Uniform Trade Secrets Act (“CUTSA”), Cal. Civ. Code §§ 3426, *et seq.*; (3) breach of  
25 employment agreement; and (4) breach of fiduciary duty and duty of loyalty. *See* Compl.

26  
27 <sup>4</sup> The court granted plaintiff’s request to seal documents, ECF No. 51, and directed  
28 plaintiff to file a redacted version by June 16, 2020 to file on the docket. *See* ECF No. 61.

1 A day after filing the complaint, on May 5, 2020, plaintiff moved the court based  
2 on both DTSA and CUTSA claims to temporarily restrain defendants from acquiring, accessing,  
3 disclosing, or using, or attempting to acquire, access, disclosure, or use any trade secrets or  
4 confidential information of ExamWorks, or derivatives thereof, including, but not limited to, any  
5 documents that discuss, forward, reference, or incorporate the trade secrets or confidential  
6 information of ExamWorks. *See generally* Mot. TRO, ECF No. 4. Plaintiff also filed its motion  
7 for discovery on an expedited basis, Mot. Disc., ECF No. 6, with a certificate of service on  
8 defendants, ECF No. 13. The court promptly set the matter for a videoconference hearing on  
9 May 8, 2020, ECF No. 15. *See also* May 8 Hr'g Tr., ECF No. 25; May 22 Hr'g Tr., ECF No. 38.  
10 Plaintiff's counsel attended that hearing, as did Ms. Byrd who at the time was in pro per; no other  
11 defendants were represented at hearing. ECF No. 15. The court granted plaintiff's motion for a  
12 temporary restraining order, finding that plaintiff carried its burden at this early stage of the  
13 litigation by raising serious questions going to the merits of the dispute and showing the balance  
14 of hardship tips in its favor. TRO, ECF No. 17, at 2.

15 On May 15, 2020, defendants appeared through counsel on the court's docket and  
16 formally opposed plaintiff's motion for preliminary injunction. Opp'n, ECF No. 26. On May 18,  
17 2020, plaintiff replied. Reply, ECF No. 27. As allowed by the court, the parties filed  
18 supplemental briefs. ECF Nos. 39–40. The court set the matter for a full preliminary injunction  
19 hearing on May 22, 2020. *Id.* After that hearing, held by videoconference, in light of the  
20 expedited discovery that was underway, the court found circumstances justified leaving the  
21 previously entered TRO in effect for a brief period of time pending supplemental briefing based  
22 on the discovery. ECF No. 37.

23 On June 3, 2020, the court heard oral argument again and later that day granted the  
24 preliminary injunction in a summary order with explanation to follow. Prelim. Inj. Order, ECF  
25 No. 45. This is the order EXPLAINING the court's grant of the preliminary injunction. At no  
26 time, either in their briefing or during hearing, did defendants request the posting of bond; thus  
27 the court has not required one. *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*,  
28 321 F.3d 878, 882 (9th Cir. 2003) (citations omitted) (no abuse of discretion in not reaching issue

1 of bond where defendant did not request bond or submit any evidence of damages she would  
2 incur as result of injunction).

3 The court also DETERMINES, as explained below, that defendants presumptively  
4 bear the costs associated with the forensic analysis plaintiff says is required to complete review of  
5 electronic discovery, subject to defendants' ability to rebut the presumption in discovery motion  
6 practice. ECF 39 at 11.

## 7 II. LEGAL STANDARDS

### 8 A. Preliminary Injunction

9 "A preliminary injunction is an extraordinary remedy never awarded as of right[.]"  
10 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted), and should not  
11 be granted unless the movant carries the burden of proving this extraordinary remedy is warranted  
12 by clear and convincing evidence, *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) ("A  
13 preliminary injunction . . . should not be granted unless the movant, by a clear showing, carries  
14 the burden of persuasion.") (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997))). In  
15 determining whether to issue a preliminary injunction, federal courts must consider whether the  
16 moving party "[1] is likely to succeed on the merits, . . . [2] is likely to suffer irreparable harm in  
17 the absence of preliminary relief, . . . [3] the balance of equities tips in [the movant's] favor, and  
18 . . . [4] an injunction is in the public interest." *Winter*, 555 U.S. at 20.

19 The Ninth Circuit has "also articulated an alternate formulation of the *Winter*  
20 test[.]" *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012). That formulation is referred to as  
21 the "serious questions" or the "sliding scale" approach: "'serious questions' going to the merits  
22 and a balance of hardships that tips sharply towards the plaintiff can support issuance of a  
23 preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable  
24 injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*,  
25 632 F.3d 1127, 1131–35 (9th Cir. 2011) ("[T]he 'serious questions' approach survives *Winter*  
26 when applied as part of the four-element *Winter* test."). Under the "serious questions" approach  
27 to a preliminary injunction, "[t]he elements of the preliminary injunction test must be balanced,  
28 so that a stronger showing of one element may offset a weaker showing of another." *Lopez*, 680



1 F.3d at 1072. In each case and irrespective of the approach to a preliminary injunction, a court  
 2 must balance the competing alleged harms while considering the effects on the parties of the  
 3 granting or withholding of the injunctive relief. *Winter*, 555 U.S. at 24. In exercising that  
 4 discretion, a court must also consider the public consequences of the extraordinary remedy. *Id.*

#### 5 B. DTSA and UTSA

6 As noted, plaintiff’s motion for injunctive relief is based on both its federal and  
 7 state trade secrets claims. “California has adopted the Uniform Trade Secrets Act (“UTSA”),  
 8 which codifies the basic principles of common law trade secret protection.” *MAI Sys. Corp. v.*  
 9 *Peak Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993) (citing Cal. Civ. Code §§ 3426–3426.10  
 10 (“CUTSA”)). To establish a violation of the CUTSA, a plaintiff must show “(1) the existence of  
 11 a trade secret, and (2) misappropriation of the trade secret.” *AccuImage Diagnostics Corp v.*  
 12 *Terarecon, Inc.*, 260 F. Supp. 2d 941, 950 (N.D. Cal. 2003).

13 At the federal level, Congress has relatively recently enacted the Defend Trade  
 14 Secrets Act (DTSA) to “provide Federal jurisdiction for the theft of trade secrets.” *See* DTSA of  
 15 2016, Pub. L. No. 114-153, 130 Stat. 376 (DTSA) (codified in scattered sections of title 18 of the  
 16 United States Code). Similarly to the CUTSA, the DTSA permits the “owner of a trade secret  
 17 that is misappropriated” to bring a civil action, 18 U.S.C. § 1836(b), and includes substantially  
 18 similar definitions of “trade secret” and “misappropriation” as found in California state law. *See*  
 19 18 U.S.C. § 1839(3), (5).

20 The parties do not assert any material difference between the CUTSA and the  
 21 DTSA. Because the elements of a trade secret misappropriation claim under the DTSA and  
 22 CUTSA are substantially similar, the court analyzes both claims together below. *See Vendavo,*  
 23 *Inc. v. Price f(x) AG*, No. 17-CV-6930-RS, 2018 WL 1456697, at \*3 (N.D. Cal. Mar. 23, 2018).

#### 24 C. California Employment Law Balanced Against Trade Secret Protections

25 At the same time that it provides for protection of trade secrets, California law  
 26 also prohibits contractual provisions “by which anyone is restrained from engaging in a lawful  
 27 profession, trade, or business of any kind.” Cal. Bus. & Prof. Code § 16600 (“Section 16600”).  
 28 This California rule is intended to protect an individual’s right to engage in employment and

1 businesses of their choosing. *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 946 (2008)  
2 (citations omitted). “[T]here appears to be a trend among California courts of finding that  
3 § 16600 represents a fundamental public policy interest in California.” *Stryker Sales Corp. v.*  
4 *Zimmer Biomet, Inc.*, 231 F. Supp. 3d 606, 621 (E.D. Cal. 2017).

5 In fact, California courts have long recognized the delicate balance between  
6 promoting unfettered competition by parties such as defendants here and protecting a business  
7 like ExamWorks from unfair conduct. As the California Supreme Court observed nearly seventy-  
8 five years ago, “[e]quity will to the fullest extent protect the property rights of employers in their  
9 trade secrets and otherwise, but public policy and natural justice require that equity should also be  
10 solicitous for the right inherent in all people, not fettered by negative covenants upon their part to  
11 the contrary to follow any of the common occupations of life.” *Cont’l Car-Na-Var Corp. v.*  
12 *Moseley*, 24 Cal. 2d 104, 110 (1944). In striking the appropriate balance in a trade secrets  
13 misappropriation case, a court is not constrained from fashioning an appropriate remedy as long  
14 as the court remains “highly cognizant of the important policies embodied” in Section 16600.  
15 *Pyro Spectaculars N., Inc. v. Souza*, 861 F. Supp. 2d 1079, 1096 (E.D. Cal. 2012) (citing *The Ret.*  
16 *Grp. v. Galante*, 176 Cal. App. 4th 1226, 1237 (2009) (clarifying the proper focus in saying “it is  
17 not the *solicitation* of the former employer’s customers, but is instead the *misuse of trade secret*  
18 *information*, that may be enjoined”) (emphasis in original)). In other words, “[w]hile it has been  
19 legally recognized that a former employee may use general knowledge, skill, and experience  
20 acquired in his or her former employment in competition with a former employer, the former  
21 employee may not use confidential information or trade secrets in doing so.” *Morlife, Inc. v.*  
22 *Perry*, 56 Cal. App. 4th 1514, 1519 (1997). The misuse of trade secrets can take the form of  
23 improper solicitation if the solicitation is based on another’s trade secrets. *Id.* at 1521; *see also*  
24 *Klamath-Orleans Lumber, Inc. v. Miller*, 87 Cal. App. 3d 458, 465 (Ct. App. 1978) (“There can  
25 be no doubt that a list of preferred customers, ascertained originally by continuous solicitation  
26 and investigation, and the specially arranged list of charges and bonuses developed by long  
27 experience, constitutes a trade secret of value.” (citation omitted)).  
28

The court explains below its balancing of the law of trade secret protection with the defendants' essential right to fairly engage in their chosen professions, if they do so lawfully.

### III. DISCUSSION

The court has found plaintiff satisfies its burden under the *Winter* test so as to warrant preliminary relief.

#### A. Likelihood of Success on the Merits

The court first focuses on the likelihood of success of ExamWorks' claims under California and federal trade secrets law. *Engility Corp. v. Daniels*, 16-CV-2473-WJM-MEH, 2016 WL 7034976, at \*8 (D. Colo. Dec. 2, 2016) (analyzing only certain claims from complaint in preliminary injunction analysis based on content of plaintiff's preliminary injunction request).

##### 1. Existence of Trade Secrets

A "trade secret" is "information, including a formula, pattern, compilation, . . . or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public . . . , and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Cal. Civ. Code § 3426.1(d). In other words, the information "is valuable because it is unknown to others" and "the owner has attempted to keep [it] secret." *DVD Copy Control Assn. v. Bunner*, 116 Cal. App. 4th 241, 251 (2004) (citation omitted).

##### a) Derives Independent Economic Value

ExamWorks identifies the following information as trade secrets contained in the files it alleges the Former Employees copied and retained. The court refers to these items here as the "ExamWorks Trade Secret Information."

- ExamWorks' "playbook" of confidential details about its California Subsequent Injury Benefit Trust Fund ("SIBTF") business, including case specific, doctor and revenue information. For example, doctor billing totals, average fees per specialty, and other marketing information such as referral details for cases ("Client and Doctor Lists");
- ExamWorks' confidential financial documents which is not shared with clients or otherwise, setting forth how ExamWorks

engages doctors in its provider network, including information on fee splits and financials for the California region, which would allow a competitor to easily recruit doctors by offering more lucrative terms (“Recipe Book”);

- ExamWorks’ confidential database of 124,756 unique client entries with detailed information for its entire U.S. client base and more than 10,000 doctors active in ExamWorks’ network, including detailed information on more than 53,000 cases from IMEC<sup>5</sup> (“IMEC Database”); and
- ExamWorks’ confidential breakdown of sales and operations strategies for California, including high-level sales stratagem, top clients in various categories, top doctors, referrals by client office as well as detailed revenue information, goals and targets, which also includes referral information from new clients. (“Marketing & Business Strategy Documents”).

Nalley Decl. ¶¶ 28–29, 31–34, 37–39; Compl. ¶¶ 61, 89 (recipe book pled, as well as summary of trade secrets); Nalley Decl. ¶¶ 10–19 (detailed descriptions of trade secrets).

For the purposes of this motion, on the present record, the court finds the information ExamWorks claims as trade secret qualifies as such, given that its compilations of information “derive[] independent economic value, actual or potential, from not being generally known to the public.” Cal. Civ. Code § 3426.1(d)(1); *see Pyro Spectaculars N., Inc.*, 861 F. Supp. 2d at 1089 (finding, though publicly available customer identity and contact information by itself may not be trade secret, plaintiff’s “comprehensive, if not encyclopedic, compilation of customer, operator, and vendor information” was likely protectable trade secret).

ExamWorks’ “Client and Doctor Lists,” for example, are likely protectable trade secrets if nonpublic, as addressed below. “Under the California [CUTSA], Cal. Civ. Code §§ 3426, *et seq.*, a customer list may constitute a protected trade secret if it includes nonpublic information that provides a ‘substantial business advantage’ to competitors.” *Pollara v. Radiant Logistics, Inc.*, 650 F. App’x 372, 373 (9th Cir. 2016) (quoting *Morlife, Inc.*, 56 Cal. App. 4th at

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<sup>5</sup> ExamWorks’ information is housed in its proprietary IMECentric and InfoCentric databases. Because IMECentric and InfoCentric programs are used in conjunction with each other, Nalley Decl. ¶ 7, for purposes of simplification, this order refers to these databases as “IMEC”.

1514). “As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret.” *Morlife*, 56 Cal. App. 4th at 1522 (citation omitted). For the purposes of obtaining a preliminary injunction, ExamWorks has offered sufficient evidence to show it has expended substantial time and effort identifying customers with particular needs and characteristics in compilations that contain more than mere identities and addresses easily identified through publicly available sources; the compilations would give a competitor a substantial business advantage in seeking to offer services to compete with ExamWorks’ fully integrated proprietary private network, Compl. ¶ 11; Nalley Decl. ¶¶ 13, 28–29 (referencing millions of dollars spent annually and innumerable person-hours to develop IMEC, which contains the list identified as “Clients.xlsx” with 124,756 unique client entries and detailed information for ExamWorks’ entire United States client base, as well as the list identified as “Doctors.xlsx” containing detailed contact information for more than 10,000 doctors across ExamWorks’ entire United States doctor network); *Morlife*, 56 Cal. App. 4th at 1521 (“[W]here the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market.”).

ExamWorks’ Recipe Book, IMEC Database and Marketing & Business Strategy Documents are also likely protectable trade secrets. These documents comprise various marketing and outreach strategies, explaining how ExamWorks engages doctors into its network. Compl. ¶ 61; Nalley Decl. ¶ 43. Specifically, ExamWorks spends significant funds on internal recruiters to persuade doctors to join ExamWorks’ network. Nalley Decl. ¶ 13. To be competitive, it also nurtures relationships with the applicant attorneys making up the workers’ compensation bar, who serve as a source of doctor referrals. *See, e.g.*, Pl.’s Suppl. Br. at 4; Mot. TRO, Ex. J (Clients.xlsx), ECF No. 28-1 (part 2), at 11–18 (NATIVE-Clients) (sealed); *id.*, ECF No. 28-3 (part 4), at 1–912 (NATIVE-Doctors) (sealed). ExamWorks captures key strategic information in a variety of ways, including revenue per doctor, margin or profitability per doctor and negotiated fee per exam for that particular doctor. Nalley Decl. ¶ 15. At this point, IMEC contains

1 information on more than 2,000 doctors who practice in California alone. *Id.* ¶ 13; *see Argo Grp.*  
 2 *US, Inc. v. Prof'l Governmental Underwriters, Inc.*, No. SACV 13-1787 AG (DFMx), 2013 WL  
 3 11327772, at \*2 (C.D. Cal. Dec. 6, 2013) (“[I]nformation regarding profit margins, costs, and  
 4 market research can be protected trade secrets.” (citing *Whyte v. Schlage Lock Co.*, 101 Cal. App.  
 5 4th 1443, 1456 (2002))).

6 For these reasons, ExamWorks has met its burden to show its compilations of  
 7 information, specifically the Client and Doctors List, IMEC database, and the Marketing &  
 8 Business Strategy Documents, have value and are not publicly available, and therefore likely  
 9 qualify as trade secrets.

10 b) Subject of Reasonable Efforts to Maintain Secrecy

11 The court also finds ExamWorks has met its burden to show at this stage the  
 12 ExamWorks Trade Secret Information has been “the subject of efforts that are reasonable under  
 13 the circumstances to maintain its secrecy.” Cal. Civ. Code § 3426.1(d)(2); *Pyro Spectaculars*,  
 14 861 F. Supp. 2d at 1092 (plaintiff’s “security practices are not perfect,” but sufficiently  
 15 reasonable to support preliminary injunction). Specifically, ExamWorks requires all employees  
 16 to sign confidentiality agreements recognizing the proprietary nature of its “[c]ustomer names,  
 17 contact information, account numbers or financial information and proprietary business  
 18 information not otherwise available to the public related to how ExamWorks does business.”  
 19 Bartsch Decl., ¶¶ 6–7, ECF No. 4-3. “Employees must recertify their understanding of the  
 20 Employee Handbook and Code of Business Conduct and Ethics at regular intervals.” *Id.* The  
 21 Employee Handbook requires employees to maintain the confidentiality of, *inter alia*,  
 22 ExamWorks’ “property . . . including any documents or files in [the employee’s] possession and  
 23 any company property in electronic form” and “ensure that all ExamWorks’ property is returned  
 24 to ExamWorks.” *Id.* ¶ 11. Here, all the Former Employees named as defendants signed  
 25 confidentiality agreements confirming their understanding of, and agreement to, ExamWorks’  
 26 confidentiality policies; in so doing they also agreed to return ExamWorks’ information upon  
 27 their departure or termination. *See* Compl. ¶¶ 31, 34, 39; *id.*, Ex. A (Girard), at 39; *id.*, Ex. C  
 28

(Baldini), at 49; *id.* Ex. E (Tejada), at 56; *id.*, Ex. F (Bird), at 60.<sup>6</sup> The confidentiality agreements were in consideration of employment with ExamWorks, and by signing them at the start of their employment defendants had notice of the agreements’ terms as conditions of their employment and agreed to be bound by them. *Cf. AUA Private Equity Partners, LLC v. Soto*, No. 1:17-CV-8035-GHW, 2018 WL 1684339, at \*5 (S.D.N.Y. Apr. 5, 2018) (acquisition by improper means properly pleaded where plaintiff alleged defendant violated confidentiality agreements she signed upon being hired, which created “contractual duty to abide by their terms”).

Additionally, ExamWorks’ network is password protected, *see* Compl. ¶ 27; Bartsch Decl., Ex. A (“ExamWorks’ Employee Handbook”), ECF No. 4-3 (“All Systems passwords and encryption keys must be available and known to the Company[.]”), and access is limited to employees who need particular data sets for the purposes of carrying out their employment. Bartsch Decl., Ex. A. ExamWorks issues mobile devices to employees, who were then able to determine the passwords they would use to protect ExamWorks’ information. *See* Compl., Ex. E, ECF No. 1, at 46 (ExamWorks Mobile Device Policy, providing in pertinent part that “ExamWorks’ Mobile Device Policy applies to all uses of your device for ExamWorks’ business or on behalf of ExamWorks. In addition, you must: Consent to ExamWorks’ efforts to manage the device and secure its data, including providing ExamWorks with any necessary passwords.”). Employees are required to take security awareness training annually and, when an employee leaves the company, ExamWorks automatically cuts off all access to databases and the network by that employee. *Id.*

ExamWorks also requires departing employees to certify that all company assets, including trade secrets, have been returned, instructing these employees to “check personal computers, email accounts, and thumb drives” and “asks each employee to return all ExamWorks’ property” before departure. Bartsch Decl. ¶ 11. Here, for example, after ExamWorks terminated defendant Baldini on April 29, 2020, ExamWorks asked him to complete

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<sup>6</sup> Defendants have not objected to the court’s consideration of the documents attached to the complaint.



1 its standard offboarding checklist and certification form; Baldini did, certifying he had “returned  
 2 all equipment, documents, software, hardware, and any other company property (whether  
 3 physical, intellectual, or other) in [his] possession.” *Id.* ¶ 44; Bartsch Decl., Ex. H, ECF No. 4-2  
 4 (offboarding checklist and certification form), at 228–229.

5 The efforts reviewed above, supported by the record before the court, are sufficient  
 6 at this stage to show ExamWorks has made reasonable efforts, at least, to maintain the secrecy of  
 7 the information it claims as trade secret.

8 c) Conclusion

9 In sum, ExamWorks has met its burden to show the ExamWorks Trade Secret  
 10 Information “derives independent economic value” and is subject to “reasonable efforts” to  
 11 protect secrecy as required by statute. *See* Cal. Civ. Code § 3426.1(d).

12 2. Misappropriation of Trade Secrets

13 The CUTSA defines misappropriation as including either the “[a]cquisition of a  
 14 trade secret of another by a person who knows or has reason to know that the trade secret was  
 15 acquired by improper means” or the “use of a trade secret of another without express or implied  
 16 consent by a person who [] [u]sed improper means to acquire knowledge of the trade secret.”  
 17 Cal. Civ. Code § 3426.1(b); *see* 18 U.S.C § 1839(5) (identical DTSA provision).

18 While “[m]ere possession of trade secrets by a departing employee” is not  
 19 sufficient to establish misappropriation, *Norsat Int’l, Inc. v. B.I.P. Corp.*, No. 12CV674-WQH-  
 20 NLS, 2014 WL 2453034, at \*6 (S.D. Cal. May 30, 2014) (quoting *FLIR Sys., Inc. v. Parrish*, 174  
 21 Cal. App. 4th 1270, 1279 (2009)), plaintiff here has met its burden to show the Former  
 22 Employees obtained the ExamWorks Trade Secret Information for their own uses purposefully,  
 23 without the consent of ExamWorks, and by “improper means.” The record supports the  
 24 conclusion the Former Employees took large quantities of ExamWorks Trade Secret Information  
 25 over time, including critical strategic information near the time of their resignations or  
 26 terminations, with significant blocks of sensitive data sent to their private email addresses, Harris  
 27 Decl. ¶¶ 6–19 -- all in violation of company policy and their employment contracts. *See* Mot.  
 28 TRO, Ex. B (“ExamWorks Confidentiality and Proprietary Rights”), ECF No. 21-1, at 60



(agreement signed by Girard, dated May 15, 2015, providing “All e-mail associated with an ExamWorks email account on the device, both outgoing and incoming, including associated e-mail attachments, created on, transmitted to, received or printed from, or stored or recorded on the device (‘corporate e-mail content’) is the property of ExamWorks.”).<sup>7</sup>

While defendants protest that much of the information they took can be obtained publicly, *see, e.g.*, Defs.’ Suppl. Br., ECF No. 41, at 6, they do not even attempt to argue that they in fact obtained the information from public sources. Moreover, the contents of many of ExamWorks’ files defy defendants’ characterization, including those entitled “Clients.xlsx,” “Financials by Company-Region-BusUnit – 2018 SIBTF.xlsx,” “Budget Worksheet – CA 2019.xlsx,” “Likely Calcs – gina.xlsx” and “California WC Fee Analysis 10\_17\_19v10.xlsx.” *See* Nalley Decl. ¶¶ 34–39; *see also id.* ¶ 6 (documents represent ExamWorks’ investment of “a significant amount of money and sweat equity” over more than a decade, to “set it apart from others in the industry”). Moreover, plaintiff has shown it is likely defendants’ transmissions of ExamWorks’ data were not only deliberate, but the culmination of a lengthy planning effort conducted surreptitiously in an effort to cloak their acquisition by improper means. As plaintiff argues, email correspondence between and among Former Employees suggests that, as early as October 2018, they were making plans to launch “Project Palo Alto,” to form a new company to compete in the same market space ExamWorks occupies; they documented the launch plan with multiple emails and planning documents, in fact, preparing to use plaintiff’s business data. Holley Decl. ¶¶ 8, 10. They began sending themselves ExamWorks’ proprietary information shortly after their covert planning began. Nalley Decl. ¶ 34. Their transfer of ExamWorks’

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<sup>7</sup> As relevant here, ExamWorks’ Code of Business Conduct and Ethics for its employees provides: “All data residing on or transmitted through the Company’s computing and communications facilities, including email and word processing documents, is the property of the Company and subject to inspection, retention and review by the Company, with or without a Community Member’s or third party’s knowledge, consent or approval, in accordance with applicable law. Personal emails, voicemails, calls or other data residing on or transmitted through the Company’s systems are subject to monitoring. Any misuse or suspected misuse of the Company’s assets must be immediately reported to your supervisor or a Compliance Officer.” Bartsch Decl., Ex. B (“ExamWorks’ Code of Bus. Conduct & Ethics”), ECF No. 4-3, at 199.

1 information continued until the first departures of Girard and Tejada, and even after they had  
2 departed while Baldini and Byrd remained at ExamWorks. Tejada's awareness of the line she  
3 was walking and the importance of officially not crossing the line until the predetermined time is  
4 telegraphed by her making a point of clarifying, before executing her new agreement for  
5 employment immediately after leaving ExamWorks, that she was to perform "no newco business"  
6 at first. Mot. Prelim. Inj. Ex. 30 (Tejada Employment Agreement), ECF No. 52-1, at 133 (Tejada  
7 note asking "no newco work during this time?"). One email in particular reflects an awareness of  
8 the potential problems defendants' actions posed, and their ongoing efforts to obscure them: On  
9 April 23, 2020, while Baldini remained employed by ExamWorks, in response to a message titled  
10 "Ground Work" he sent to George, Girard and Tejada, as well as Feinberg and Tuthill, George  
11 responded "Todd. . . you should NOT be on these emails [*sic*] threads. . . and certainly not be  
12 calling meetings or making to do lists. . . not while you are employed elsewhere. Please . . . go  
13 dark . . . or limit to telephone only comm. Get me?" Mot. Prelim. Inj., Ex. 24 ("April 23 Baldini  
14 Email"), ECF No. 52-1, at 112. Baldini acknowledged the warning later that day, "Gone Dark!!!"  
15 *Id.*

16 Not long after, upon learning that plaintiff had filed this lawsuit, George wrote  
17 tellingly to Girard, "you have been leaving a trail for a long time . . . and that is not good. The  
18 good news is there is no company . . . no nuco." Mot. Prelim. Inj., Ex. 25 ("May 5 George  
19 Email"), ECF No. 52-1, at 115. But while there was no "nuco" yet, plaintiff's complaint was  
20 filed during the interim period contemplated by defendants, before the unveiling of their new  
21 enterprise.

22 The record further discloses that the Former Employees not only improperly  
23 acquired ExamWorks' Trade Secret Information for their personal use in working to develop the  
24 "Project Palo Alto" plan, but they maintained ExamWorks' information without returning it upon  
25 their departure. It was only after plaintiff filed the complaint and moved for a restraining order  
26 and preliminary injunction that defendants started to take some steps to return ExamWorks' trade  
27 secrets. Baldini now admits that when he completed the offboarding checklist and certification  
28 form upon leaving ExamWorks, despite his answers then, he in fact had not "returned all

1 equipment, documents, software, hardware, and any other company property (whether physical,  
2 intellectual, or other) in [his] possession.” Baldini Decl. ¶ 2, ECF No. 26-5; Bartsch Decl., Ex. H,  
3 (offboarding checklist and certification form), at 228–229. He also admits “he used personal  
4 electronic resources against ExamWorks policies.” Baldini Decl. ¶ 2 (admitting before leaving  
5 ExamWorks in April 29, 2020, he sent various ExamWorks’ documents to his personal email).  
6 Girard and Bird have made similar admissions following ExamWorks’ filing of its complaint.  
7 Girard Decl. ¶ 2, ECF No. 26-2 (admitting before leaving in March 13, 2020, sending various  
8 ExamWorks’ documents to his personal email address); Bird Decl. ¶ 2, ECF No. 26-3 (admitting  
9 on December 2, 2019, she emailed Girard two ExamWorks’ spreadsheets to his personal email  
10 address). While Ms. Bird takes the position that she only worked for Girard, doing whatever he  
11 asked her to, Bird Dec. ¶ 2, she did not promptly produce her personal email account to plaintiff  
12 as ordered by the court, *see* Pl.’s Suppl. Brief at 9, although her counsel reported at hearing that  
13 she had finally produced it shortly before.

14           The record also supports the conclusion the Former Employees not only acquired  
15 but also have used ExamWorks Trade Secret Information without consent. Three defendants  
16 aver, using identical, carefully crafted language, that each has not “used any ExamWorks  
17 documents since I left to compete with it or to take any opportunities from it,” Girard Decl. ¶ 2;  
18 Baldini Decl. ¶ 2 (same); Tejada Decl. ¶ 5. This wording does not acknowledge that acquisition  
19 is sufficient for misappropriation; moreover, at least two items in the record strongly support the  
20 conclusion defendant have in fact made unauthorized use of at least certain information, and that  
21 also is sufficient. *See* 3 Callmann on Unfair Comp., Tr. & Mono. § 14:32 (4th ed. 2019) (“It is  
22 not necessary to show that the defendant used the trade secret in competition with the plaintiff;  
23 either improper acquisition or use of the trade secret is enough to make out a case  
24 of misappropriation.”) (citing, *inter alia*, *San Jose Constr., Inc. v. S.B.C.C., Inc.*, 155 Cal. App.  
25 4th 1528, 1544 (2007) (“[U]nder the UTSA ‘misappropriation’ can occur through  
26 improper acquisition of a trade secret, not only through use.” (emphasis in original))). One is  
27 Girard’s March 19 email specifically referencing “the spreadsheet we used to blast our message  
28 yesterday,” attaching a document bearing the title of an ExamWorks’ proprietary list. Pl.’s Suppl.

Br. at 2. Girard’s saying now he was confused, and providing a copy of a template for the letter he says was sent, does not explain away his attaching a link to the proprietary spreadsheet to his message. The second is another email Girard sent on April 28 to Tejada, saying “I am looking for the short list of SIBTF doctors to recruit.” Mot. Prelim. Inj., Ex. 26, ECF No. 52-1 (“April 28 Girard Email”), at 118, to which Tejada responded by sending him ExamWorks’ SIBTF spreadsheet. If there is some truth to defendants’ saying they have not competed directly with ExamWorks or taken opportunities from it, their careful parsing may simply omit the word “yet.”

Taking into account all of this information of record, the court concludes that, at this early stage, ExamWorks has shown a likelihood of success on the misappropriation element of its trade secrets claims.

#### B. Irreparable Harm

The court turns to whether ExamWorks has met its burden to demonstrate it will suffer irreparable harm in the absence of a preliminary injunction. *Winter*, 555 U.S. at 20. “An irreparable harm is one that cannot be redressed by a legal or equitable remedy following trial.” *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F. Supp. 2d 1037, 1050 (N.D. Cal. 2004) (citing *Public Util. Comm’n v. FERC*, 814 F.2d 560, 562 (9th Cir. 1987)). Ordinarily, economic injury is not irreparable because monetary damages are an adequate remedy. *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). However, “intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm.” *Id.*; see also *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) (evidence of threatened loss of prospective customers or goodwill supports irreparable harm finding). Although “loss of control over business reputation and damage to goodwill could constitute irreparable harm,” a court’s finding of such harm cannot be “grounded in platitudes rather than evidence.” *Herb Reed Enters., LLC v. Fla. Entm’t Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013). A plaintiff must “demonstrate a likelihood of irreparable injury—not just a possibility—in order to obtain preliminary relief,” *Winter*, 555 U.S. at 21.<sup>8</sup>

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<sup>8</sup> Although establishing a likelihood of success in one type of intellectual property case, namely a trademark infringement action, may once have created a presumption of irreparable

1 The court finds ExamWorks has met its burden of showing a likelihood of  
 2 irreparable harm by pointing to the threatened loss of prospective customers posed by defendants’  
 3 actions, as well as the threat to ExamWorks’ ongoing business recruitment efforts.

4 Defendants’ deep familiarity with ExamWorks’ proprietary information and their  
 5 detailed advance planning to enter the same “med-legal” market to compete with ExamWorks—  
 6 after a brief, orchestrated cooling-off period for the sake of optics—supports the conclusion they  
 7 cannot solicit the persons and companies on ExamWorks’ proprietary lists without  
 8 misappropriating ExamWorks’ trade secrets. As noted above, those lists are not merely copies of  
 9 publicly available lists, but lists developed through ExamWorks’ significant efforts over time.  
 10 *Morlife*, 56 Cal. App. 4th at 1521 (“[W]here the employer has expended time and effort  
 11 identifying customers with particular needs or characteristics, courts will prohibit former  
 12 employees from using this information to capture a share of the market.”); *id.* at 1528–29; *see*  
 13 *also MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 515, 520 (9th Cir. 1993) (district  
 14 court enjoined defendants “from soliciting any [plaintiff] computer maintenance customer and  
 15 from maintaining any contract with any former [plaintiff] computer maintenance customer where  
 16 knowledge of any such customers was obtained by [defendant] during his employment with  
 17 [plaintiff]”; injunction upheld to extent it properly enjoined customer solicitation). This

18  
 19 harm, *see Herb Reed Enterprises, LLC*, 736 F.3d at 1250–51, recent Ninth Circuit cases have  
 20 called into question whether this presumption is consistent with the Supreme Court’s decision in  
 21 *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 394 (2006). *See 7-Eleven, Inc. v. Dhaliwal*, No.  
 22 12-CV-02276-KJM-GGH, 2012 WL 5880462, at \*6–7 (E.D. Cal. Nov. 21, 2012) (citing *eBay*  
 23 *Inc., LLC*, 547 U.S. at 394; *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d  
 24 873, 877 (9th Cir. 2009); *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th  
 25 Cir. 2011)). While the Ninth Circuit has yet to directly address the impact of *eBay* on courts’  
 26 power to presume irreparable harm in trade secrets cases in particular, this court has joined those  
 27 district courts who decline to rely on a presumption in determining irreparable harm. *See Cutera,*  
 28 *Inc. v. Lutronic Aesthetics, Inc.*, No. 2:20-CV-00235-KJM-DB, 2020 WL 1234551, at \*7 (E.D.  
 Cal. Mar. 13, 2020); *see also V’Guara Inc. v. Dec*, 925 F. Supp. 2d 1120, 1126 (D. Nev. 2013)  
 (citing *Flexible Lifeline Systems* in declining to presume irreparable harm in trade secrets case);  
*but see Comet Techs. United States of Am. Inc. v. Beuerman*, No. 18-CV-01441-LHK, 2018 WL  
 1990226, at \*5 (N.D. Cal. Mar. 15, 2018) (citing pre-*Flexible Lifeline Systems* district court  
 decisions for proposition that courts in that district presume plaintiff will suffer irreparable harm  
 if proprietary information is misappropriated).

1 conclusion extends to all of ExamWorks' curated lists, including the client list attached to  
2 Girard's March 19 email and the SIBTF list Tejada emailed to Girard on April 28, 2020.

3 Defendants' actions also have unfairly threatened ExamWorks' ability to recruit  
4 new business through the use of its proprietary information. Here again, Girard's April 28 email  
5 to Tejada provides support for this conclusion, in that Girard expressly said he was "looking for  
6 the short list of SIBTF doctors to recruit." April 28 Girard Email at 118. Also, although Tejada  
7 says she sent the "Brown & Todoroff.xlsx" list to her personal email address on January 16 to  
8 make sure she had a copy in the event of a bad internet connection, plaintiffs point to the  
9 highlighting of unassigned cases on that list that allows for easy identification and poaching by a  
10 competitor. Nalley Decl. ¶¶ 28–29, 31–34, 37–39.

11 Defendants would have the court accept that any threat they pose to ExamWorks is  
12 now a thing of the past. They take the position that since their resignations and terminations, the  
13 only ExamWorks document they have accessed is a list identified as "Clients.xlsx," and insist it  
14 contains only publicly available information. Defs.' Suppl. Br. at 3. But again, the list compiled  
15 by ExamWorks identifies applicant attorneys comprising 124,756 unique entries with detailed  
16 contact information. Compl. ¶ 67; Mot. TRO, Ex. J (Clients.xlsx), ECF No. 28-1 (part 2), at 11–  
17 18 (NATIVE-Clients) (sealed); *id.*, ECF No. 28-3 (part 4), at 1–912 (NATIVE-Doctors) (sealed).  
18 Defendants further argue that even if this list is a trade secret, it does not support an injunction in  
19 this case, as there is no evidence that any applicant attorneys the Former Employees may have  
20 solicited have actually done business with them. Defs.' Suppl. Br. at 3.

21 Defendants' argument does not grapple with the fact Former Employees were in  
22 the process of forming their new company although not yet launched; it also does not hold up in  
23 light of the totality of the record before the court reviewed above. The "Clients.xlsx" list is not  
24 the only list defendants misappropriated and used without consent. While defendants have  
25 conceded the error of certain of their ways, they have not provided full disavowals of their plan to  
26 implement Project Palo Alto by launching a business to unfairly compete with ExamWorks.  
27 Defendants have dawdled in turning over all of the discovery ordered by the court. May 22 Hr'g  
28 Tr., ECF No. 38, at 4:1–4 (plaintiff's counsel's un rebutted representation that after signing

1 declaration saying she turned everything over, Tejada still had hard copy documents at home); *id.*  
2 at 4:4–7 (counsel also saying Tejada “has not been able to provide” plaintiff with password for  
3 Dropbox account Girard instructed her to place documents in). As noted, Ms. Bird produced her  
4 email account only a few days before the court’s June 3 hearing, such that plaintiff had not had an  
5 opportunity to review it. This behavior raises a red flag and at this point allows the drawing of  
6 adverse inferences. *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 911 (9th Cir. 2008)  
7 (district court has discretion to draw adverse inference when deprived of source of information).  
8 Defendants also appear to have been slow to otherwise comply with the court’s orders. *Id.* at 6:1–  
9 3 (counsel representing Tejada testified at deposition she was still contacting persons she worked  
10 with at ExamWorks after entry of TRO).

11 The court finds ExamWorks has met its burden to show it is likely to suffer irreparable  
12 harm without a preliminary injunction.

13 C. Balance of Equities

14 The balance of equities also tips in ExamWorks’ favor. *See Winter*, 555 U.S. at 20. An  
15 injunction will make clear to the Former Employees, as appears necessary, that they cannot  
16 further use any of ExamWorks Trade Secret Information and minimize the competitive harm  
17 ExamWorks might otherwise suffer as a result. An injunction tailored to the circumstances of  
18 this case will merely prevent Former Employees from engaging in unlawful acts. Here in  
19 particular, the circumstances support an injunction restraining defendants from conducting  
20 business with any individual or entity that did business with ExamWorks before defendants  
21 stopped working there, to the extent those individuals or entities are identified in the bundle of  
22 trade secret materials defendants misappropriated. As in *Morlife*, defendants remain free to  
23 engage in their professions and solicit customers whose identities, with all of the associated  
24 strategic information, are not ExamWorks’ trade secrets. 56 Cal. App. 4th 1514 at 1528–29.  
25 While defendants complain that such an injunction is overbroad and poses great harm to them,  
26 their declarations supporting this position are generalized without providing meaningful detail  
27 addressing the analysis called for here. Girard Decl. ¶ 7; Bird Decl. ¶ 5; Tejada Decl. ¶ 7; Baldini  
28



Decl. ¶ 5. Moreover, that they have not sought a bond as a condition of an injunction's issuing suggests their harm is overstated.

At this stage and on this record, the well-supported likely risk of competitive harm to ExamWorks from the Former Employee's misappropriation of the ExamWorks Trade Secrets Information outweighs the speculative risk to the Former Employees. The balance of equities tips in ExamWorks' favor.

D. Public Interest

"In exercising their sound discretion, courts of equity should pay particular regard to the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). As noted above, trade secret cases involving former employees traditionally often invoke the two competing public interests of trade secret protection and employee mobility. *Pyro Spectaculars*, 861 F. Supp. 2d at 1092–93; *see also Morlife*, 56 Cal. App. 4th at 1520.

Here, the court has found ExamWorks has shown a likelihood of success on the merits of its trade secrets claims, a likelihood of irreparable harm if an injunction is not granted and that the balance of equities tips in ExamWorks' favor. Where the requested injunction will restrain only the Former Employees' unlawful use of ExamWorks' trade secrets, the public's interest in these circumstances favors issuance of the injunction. *See Pyro Spectaculars*, 861 F. Supp. 2d at 1093 (public interest supported injunction "specifically focused on preventing misuse of PSI's trade secrets to solicit PSI's customers" where plaintiff satisfied three other preliminary injunction requirements); *Fid. Brokerage Servs. LLC v. McNamara*, No. 11 CV 1092 MMA RBB, 2011 WL 2117546, at \*8 (S.D. Cal. May 27, 2011) ("[An] injunction does not prohibit defendants from engaging in lawful conduct to service their new and existing clients. Rather, it narrowly restricts the unlawful solicitation of plaintiff's clientele through use of plaintiff's trade secret information.").

IV. DISCOVERY COSTS

Defendants argue they cannot finance use of an expert by ExamWorks with an hourly rate of \$550, Opp'n at 7, and say costs of the forensic expert's review of the expedited



1 discovery should be borne entirely by ExamWorks; alternately, they say the individual defendants  
2 should pay only for the collection and imaging of their devices and the removal of any  
3 ExamWorks' information from the devices. Opp'n at 24. Under federal discovery rules, "the  
4 presumption is that the responding party must bear the expense of complying with discovery  
5 requests, but [] may invoke the district court's discretion under Rule 26(c) to grant orders  
6 protecting him from 'undue burden or expense.'" *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S.  
7 340, 358 (1978). In exercising this discretion, the court must decide "whether to leave the cost of  
8 complying with its order where it falls, on the defendant, or place it on the party that benefits, the  
9 representative plaintiff." *Id.* "[T]he test in this respect normally should be whether the cost is  
10 substantial . . . in relation to ability to pay." *Id.* at 361–62.

11 Defendants argue the "Individual Defendants are being financially crushed by this  
12 litigation, and cannot finance use of an expert by ExamWorks." Opp'n at 7. Defendants'  
13 declarations note their personal financial obligations. Girard Decl. ¶ 7 (financial responsibilities  
14 for assisted living costs for mother, health insurance gap, daughter's student loans, and low equity  
15 in home due to COVID-19); Bird Decl. ¶ 5 (unemployed and not paying for attorney in this  
16 litigation); Tejada Decl. ¶ 7 (stating she is "not paying for, nor do I have the resources to pay for,  
17 attorney's fees or the cost of this litigation," without further explanation); Baldini Decl. ¶ 5 ("My  
18 personal/financial wealth is basically month to month. I support a full family with two out of  
19 state college students and extensive student loans."). The court is not unsympathetic to such  
20 obligations, but defendants do not squarely address their overall ability to pay. Recognizing early  
21 on in their planning of "Project Palo Alto" the likelihood of an "EW reaction" to their plans at  
22 some point, it appears Girard and Baldini each contemplated investing significant amounts  
23 monthly in their new business. Holley Decl., Ex. E, ECF 21-2, at 19-20 (identifying "Expected  
24 EW reaction in each scenario" on Project Palo Alto topic outline; estimating "all in average of  
25 \$28K per person per mo."). And Bird and Tejada signal now that someone else is covering any  
26 litigation costs incurred on their behalf, because they are not.

27 Given that defendants have conceded improperly taking ExamWorks' trade secrets  
28 and the court has found they did so intentionally, they have not overcome the presumption that as

1 the responding party they must bear the expense of discovery, including the costs of the forensic  
2 expert. This determination, however, does not preclude defendants' seeking to overcome the  
3 presumption through discovery motion practice before the assigned magistrate judge.

4 V. CONCLUSION

5 For the reasons EXPLAINED above, the court CONFIRMS its grant of  
6 ExamWorks' motion for a preliminary injunction order against defendants on the terms the court  
7 provided in its June 3, 2020 order, ECF No. 45:

8 1. Defendants are ordered to continue taking all steps to preserve evidence relevant to  
9 the allegations of the complaint and/or their employment with ExamWorks, including, but not  
10 limited to, any email or cloud storage accounts, computers, servers, USB thumb drives, and any  
11 other electronic devices that contain relevant electronic evidence.

12 2. Defendants are further ordered, at their own expense, to continue making any  
13 electronic device or account that contains relevant electronic evidence available immediately to a  
14 neutral and mutually agreed-upon third-party forensic expert (the "Forensic Expert") in order to  
15 create a forensically sound image of said device, or, in the alternative, turn over the actual  
16 electronic device to the Forensic Expert.

17 3. Defendants and all persons in active concert or participation with them are hereby  
18 enjoined from acquiring, accessing, disclosing, or using, or attempting to acquire, access,  
19 disclosure, or use any trade secrets or confidential information of ExamWorks, or derivatives  
20 thereof, as described in the complaint in this action, including, but not limited to, any documents  
21 that discuss, forward, reference, or incorporate the trade secrets or confidential information of  
22 ExamWorks. For purposes of this order, the legal definition of "trade secret" is all nonpublic  
23 "forms and types of financial, business, scientific, technical, economic, or engineering  
24 information, including patterns, plans, compilations, program devices, formulas, designs,  
25 prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or  
26 intangible, and whether or how stored, compiled, or memorialized physically, electronically,  
27 graphically, photographically, or in writing." *See* 18 U.S.C. § 1839(3). For purposes of this

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1 order, “confidential information” means all other information belonging to or otherwise relating  
2 to the business of ExamWorks or its affiliates which is not generally known.

3 4. Defendants and all persons in active concert or participation with them are ordered  
4 to continue returning, without delay, all ExamWorks trade secrets and confidential information in  
5 their possession, custody, or control to the office of counsel for ExamWorks (Catherine Lui,  
6 Orrick, Herrington & Sutcliffe LLP, 400 Capitol Mall # 3000, Sacramento, CA 95814) to the  
7 extent there are not materials already turned over to the Forensic Expert.

8 5. Defendants are ordered, at their own expense, to work with the Forensic Expert to  
9 permanently and forensically remove from all of their computers, servers, and other electronic  
10 devices any trade secrets or confidential information of ExamWorks, or derivatives thereof,  
11 including, but not limited to, any documents that discuss, forward, reference, or incorporate the  
12 trade secrets or confidential information of ExamWorks, as defined in paragraph 3 above.

13 6. Defendants are hereby enjoined from conducting business with any individual or  
14 entity that did business with ExamWorks before defendants stopped working there, to the extent  
15 those individuals or entities are identified in the bundle of trade secret materials misappropriated  
16 by defendants, including, without limitation, curated lists identifying ExamWorks’ clients,  
17 medical providers, and doctors; provided, however, that defendants are not precluded from  
18 lawfully announcing their new employment as long as any announcement does not make use of  
19 plaintiff’s trade secrets.

20 IT IS SO ORDERED.

21 DATED: June 11, 2020.

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24 CHIEF UNITED STATES DISTRICT JUDGE  
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